

**BEFORE THE HEARING OFFICER FOR THE
STATE DEPARTMENT OF EDUCATION**

Student [REDACTED])	H-16-12-21a
)	
“Student”)	MEMORANDUM
)	DECISION ON MOTIONS
and)	FOR SUMMARY JUDGMENT
)	AND ORDER
Blackfoot School District #55,)	
)	
“District.”)	
_____)	

The Parent filed a request for an IDEA Due Process Hearing on behalf of a child with a disability (the Student) which was received by the Idaho State Department of Education on December 21, 2016.

The parties met in a Resolution Session pursuant to 34 CFR 500.510 and no resolution was reached. The resolution period has concluded.

A telephonic Scheduling Conference was conducted and a scheduling order was entered. This matter was set for hearing on February 16 and 17, 2017 in the District’s offices. Both the District and the Parent submitted Pre Hearing Statements and filed motions for Summary Judgment supported by Affidavits and Exhibits.

The Hearing Officer granted the District’s motion for summary judgment by order on February 9, 2017 and indicated that a memorandum decision would be entered detailing the basis for the Hearing Officer’s decision granting the motion for summary judgment. This Memorandum Decision and Order constitutes Findings of Fact and Conclusions of Law regardless of the form of the Memorandum Decision that follows.

This Decision refers to the affiants by their relationship to the Parent, Student or District. Their names are set out in the Personally Identifiable Coversheet which is to be removed for

purposes of protecting such confidential information. The Record is separately transmitted to the State Department of Education in the Transmittal of the Record.

Appropriateness of ruling on a Pre Hearing Motion to Dismiss or for Summary Judgment.

The Idaho Rules of Administrative Procedures of the Attorney General (IDAPA) permits a Special Education Hearing Officer to consider and decide Pre Hearing Motions with or without oral argument, IDAPA 04.11.01.565. Oral Argument is not necessary here. It is appropriate to consider the Motions for Summary Judgment based on the submissions of the parties.

In considering whether summary judgment is appropriate in the Due Process Administrative Hearing setting the Hearing Officer is to consider whether there are any genuine issues of material fact and whether the moving party is entitled to the requested action as a matter of law.

Ruling on the Pre Hearing Motions of the parties is not inconsistent with the requirements of IDEA and its enabling regulations.

The Parent is self-represented and is given some leeway in the manner in which documents are submitted or how arguments are made in the prehearing process. However self-represented parents in this setting are still required to offer sufficient facts to create material questions of fact to avoid Summary Judgment.

A material factual question goes to whether it's more likely than not that events occurred as have been alleged, giving the Parent the benefit of the doubt as to the interpretation of the facts that are contained in the record. The Hearing Officer should be satisfied that there are no material questions of fact. The Hearing Officer should also be satisfied that a party is entitled to relief as a matter of law in order to grant Summary Judgment.

In this context the Hearing Officer is to determine whether IDEA, its regulations and interpretive law provide a basis to grant the remedy sought by the Parent.

The claims of the parties

The Parent has requested that the District be compelled to provide fluid hydration to the Student by way of an oral syringe. The Parent contends that the District should honor the Doctor's orders for the use of an oral syringe to provide fluid hydration and that in failing to do so the District jeopardizes the Student's health in violation of IDEA.

The Parent provided a Memorandum in Support of Summary Judgment as well as the Affidavits of the Parent with exhibits, the Parent's friend, the Student's grandfather, the Student's grandmother, the Nurse Practitioner providing primary care to the Student with exhibits, the Student's Occupational Therapist and the Student's in-home caregiver with exhibits.

The District's Motion for Summary Judgment argues that the Parent's claims had been previously investigated by the State Department of Education pursuant to 34 CFR 300.151 through 300.153 and are barred by the doctrines of res judicata and collateral estoppel. Further, the District objects to providing fluid hydration to the Student by way of an oral syringe based on a concern about the procedure the District is being asked to utilize and a lack of training from the Student's care providers. The District also argues that there is a lack of a relationship between receiving hydration by way of an oral syringe and the effect on the Student's participation in special education. The District presently provides fluid hydration to the Student by way of a straw when also providing food. The Student also has a GI tube. The District also relies on the results of a Swallow Study performed by District's staff expressing concerns about the risk of the Student's aspiration utilizing the oral syringe to provide fluid hydration.

The District supports its Motion for Summary Judgment with a Memorandum and an Affidavit of the District's Special Education Director with Exhibits, the District's Occupational Therapist, the District's nurse and the District's Attorney with Exhibits.

There are no issues of material fact. The parties disagree about what should be done, but do not disagree about the information provided by each other in the Parent's efforts to persuade the District to use a different method of fluid hydration.

Additionally, in considering whether it would be fair to grant summary judgment, the Hearing Officer may consider whether there are any procedural concerns raised by the District's IEP Team meetings or assessment process. Based on this Record there are no procedural violations which would affect the appropriateness of entering Summary Judgment.

Application of res judicata or collateral estoppel

The District argues that res judicata precludes the Parent from proceeding to assert the IDEA claims in this action based on the resolution of a State Administrative Complaint Investigation conducted pursuant to 34 CFR 300.151 and 34 CFR 300.153.

Res judicata applies when there is an identity of claims, a final judgment on the merits and privity between the parties and has been applied in the IDEA Due Process Hearing Administrative setting. See for example, *Independent School District of Boise City #1, 115 LRP 28482 (SEA ID 06/16/15)*.

An identity of claims exists when two arguably separate actions arise from the same transactional nucleus of facts. *Jaylynn Bacon-Dorow, v, Prescott Unified School District No. 1, 114 LRP 49111*. Res judicata is intended to address not only the claims that are actually litigated but the claims that could have been asserted in the prior action.

Additionally, an analysis of the fairness of applying res judicata is appropriate and requires the Hearing Officer to consider among other things whether the parties are given an adequate opportunity to litigate their claims. See for example *S.M. by and through his Guardian ad Litem, J.R., v. San Jose Unified School District, et al.*, 115 LRP 16137

In this context the Hearing Officer should consider the circumstances of a State Administrative Complaint Investigation, 34 CFR 300.513(c).

This Due Process Hearing request was filed subsequent to the Idaho Department of Education's investigation concluding that the allegations of the Parent were unfounded.

The Federal Department of Education, Office of Special Education Programs (OSEP) has stated that it would be inconsistent with the IDEA for a State Department of Education (SEA) to require the individual filing a State Administrative Complaint to bear the burden of proof in a Complaint Investigation pursuant to 34 CFR 300.151-153. Once an SEA receives a parent's State Administrative Complaint, it's entirely up to the SEA to draft allegations for investigation, gather evidence and make an independent determination of whether the allegations are founded indicating that the School District was out of compliance. OSEP acknowledged that the U.S. Supreme Court in *Schaffer v. Weast*, 44 IDELR 150 (2005), placed the burden of proof in a due process hearing on the party seeking relief. "However, in the Department's view, that case is not applicable to State complaints because both the legal authority and the purpose for State Complaint is separate and broader than for due process hearings," *Letter to Reilly*, 64 IDELR 219 (OSEP 2014).

The State Administrative Complaint must allege a violation that occurred not more than one year prior to the date that the State Administrative Complaint was filed, 34 CFR 300.153 (c), making the statute of limitations of actions to be considered by the Hearing Officer in a due process

hearing request different than the limitation on facts that can be considered by the State Department of Education in a State Complaint Investigation.

The Complaint Investigation does not permit the parties to be sworn in or examine witnesses as anticipated by IDAPA and as would be applicable in this Due Process Hearing. See generally, *Vultaggio, ex rel v. Board of Education, Smithtown Central School District, et al* 343 F.3d 598, 103 LRP 41179, 39 IDELR 261, concluding that the investigation of a state administrative complaint is different than the due process hearing procedures.

Given that there is no burden of proof required in the State Administrative Complaint Investigation, that there are none of the features of an IDEA due process hearing present in a State Complaint Investigation and the statute of limitations are different, Res judicata or collateral estoppel do not foreclose the complainant in an State Administrative Complaint from subsequently bringing a due process hearing request even if the factual basis of the State Administrative Complaint and the requested relief is the same.

Nature of the requested remedy

The Student is eligible for Special Education and related services provided as part of a Free and Appropriate Public Education. The Student has Rett's syndrome, a significant disabling condition which includes a substantial risk of aspiration related to the introduction of food solids and fluids into the Student's mouth (see Swallow study, Ex 1 to Affidavit of the Parent)

The Parent has requested that the District be ordered to provide fluid hydration by way of an oral syringe. The District contends that its method of supplying the volume of hydration by way of a straw in a glass essentially gets the same volume of fluid into the Student's mouth.

Either method, the oral syringe or the straw is calculated to place fluid in the Student's mouth. It is then necessary for the Student to swallow the fluids placed in the Student's mouth.¹

IDEA requires a School District to provide related services to assist a student to benefit from Special Education, *34 CFR 300.34*.

The nursing/health related service is providing hydration. There is nothing in this record supporting a conclusion that the Student is not been adequately hydrated by the District's chosen method of hydration.

The issue is not one of the District's refusal to provide a related service but is instead how to provide the related service. Without more, the question appears simply to be one of which method of hydrating the Student is appropriate. The relief sought by the Parent is to change how the nursing/health related service is provided by the District. Based on this Record there is no showing that the difference in the method of providing hydration in any way assists the Student's ability to benefit from special education.

The Parent has demonstrated that there are alternative methods of providing hydration, not that the District has chosen a method which is not appropriate. By that I mean that there is no discernable difference based on this record of how fluid is introduced into the Student's mouth by use of a straw or an oral syringe.

The amount of hydration available through the oral syringe based on the Parent's Affidavit is described as few teaspoons. It is difficult based on this Record to determine that the health needs of the Student are affected by the relatively small amount of fluid to be administered.

¹ The Parent has not demonstrated that the present method by which the District provides hydration is inadequate or why it would be more appropriate for the Student to be provided hydration by way of an oral syringe. The Parent does not argue that the District failed to consider the concerns presented or that there was an inadequate opportunity to participate in the IEP Team Meeting. The record reflects that the IEP Team meet, specifically considered the concerns and alternatives of the parent, conducted a swallow study by the SLP and OT and considered the results of the swallow study and additional information provided by the Student's private care providers. (See Affidavit of the Parent)

This characterization of the issue may unfortunately simply beg the issue of whether the Student can swallow a sufficient volume of water to meet the Student's hydration needs.²

There is no information in the Record which demonstrates the relationship of the fluid hydration method requested by the Parent and the Student's participation in special education. Such a relationship is necessary. Though it is undisputed that the Student would generally benefit from being sufficiently hydrated, there is nothing to demonstrate that the Student would be more engaged or more able to participate in the daily school activities if receiving several teaspoons of water through an oral syringe.³

² If I have missed characterized the issue by failing to understand that the oral syringe is intended to introduce fluids into the Student's mouth which avoids the necessity of the Student's swallowing, then I am more persuaded that the District's method of providing hydration based on this record is more appropriate than what the Parent is asking. The risk of the Student's aspiration would appear to increase if fluid were to be injected directly into the Student's throat eliminating the necessity of the Student's swallowing. The Student also has a GI tube available to address hydration. The SCOTUS analysis of the definition of school health services distinguished from medical services is helpful here. See *Cedar Rapids Community School District v. Garrett F.* 526 US 66 (1999).

³ This is not to suggest a lack of empathy for the Student and the Parent's advocacy on the Student's behalf. The District's Swallow Study and Speech Language Pathologist described the general physical condition of the Student on the day of the Swallow Study.

Decision & Order

There are no issues of material fact which preclude summary judgment. The Parent is not entitled as a matter of law to require the District to provide hydration by way of an oral syringe.

The District's Motion for Summary Judgment is granted. The Parent's Motion for Summary Judgment is denied and the Parent's request for a Due Process Hearing is dismissed.

DATED this 15 February, 2017.



Edwin L. Litteneker
Hearing Officer

Notice of Right to Appeal

NOTICE IS HEREBY GIVEN that any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the Due Process Complaint Notice requesting a Due Process Hearing under 20 U.S.C. Sec 1415 (i)(1).

The action may be brought in any State Court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy. (*See* 20 U.S.C. Sec. 1415 (1)(2)).

Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or, if the State has an explicit time limitation for bringing civil actions under Part B 13 of the Act, in the time allowed by that State law.** (*See* 34 CFR 516 (b). **Emphasis added**). IDAPA 08.02.03.109.05(g) provides that “An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of a hearing officer’s decision”.

I DO HEREBY CERTIFY that a true
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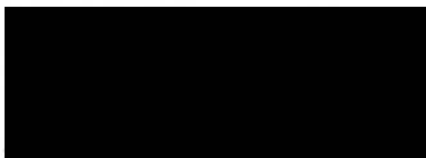
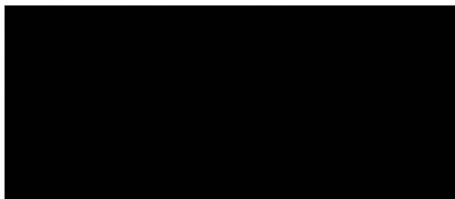
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Melanie Reese
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On this 15 day of February, 2017.



Edwin L. Litteneker